EXHIBIT F TO THE AFFIRMATION

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SUNNYSIDE DEVELOPMENT COMPANY, LLC,

Plaintiff,

v.

OPSYS LIMITED, a United Kingdom Company,

Defendant.

Case No. C 05-00553 MHP

DEFENDANT OPSYS LIMITED'S OPPOSITION TO PLAINTIFF'S MOTION TO ADD CAMBRIDGE DISPLAY TECHNOLOGY, INC. AS A PARTY AND JUDGMENT

Date: May 16, 2007
Time: 1:00 p.m.
Courtroom: 15, 18th Floor
Judge: Hon. Marilyn Hall Patel

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I. INTRODUCTION

Opsys Limited opposes Plaintiff Sunnyside Development Company LLC's ("Plaintiff") motion to add Cambridge Display Technology, Inc. ("CDT") as a party to this action and judgment.[1] Plaintiff's motion is nothing more than a hunt for a deep pocket which, if allowed, would work a substantial injustice.

In 2002, CDT purchased a 16% interest in a UK subsidiary of Opsys Limited, which held the assets of Opsys Limited's UK business. At the time, CDT was clear that it did not want any part of Opsys Limited's US business, including the liabilities related to that business, such as the Fremont lease, and the transaction was structured to ensure that it had no exposure to those liabilities. Although Opsys Limited's consolidated business had assets of just two million British pounds, Opsys Limited received $5 million from CDT in the deal plus an option on CDT stock.[2]

In December 2004, Opsys Limited became a wholly-owned subsidiary of CDT in a stock purchase transaction. CDT expressly conditioned the 2004 transaction on Opsys Limited's liabilities being below $1.25 million, which all parties believed to be the case. Had Plaintiff attempted to enforce its lease at any time in the intervening two years after it decided the lease Assignment was not effective, and *before* CDT acquired the stock of Opsys Limited in December 2004, CDT would not have consummated any transaction with Opsys Limited, and this motion would not be before the Court. After years of silently sitting on its rights, Plaintiff cannot now receive a windfall recovery from an entity that was never a party to the lease and who believed, because of Plaintiff's inaction, that the Fremont lease had been effectively assigned to a separate corporation not affiliated with Opsys Limited.

Moreover, as explained in Opsys Limited's Statement of Record re: CDT (Docket No. 175), this Court long ago dismissed ***with prejudice*** Plaintiff's two attempts to hold CDT liable for Opsys Limited's lease.[3] Although Plaintiff tries to evade those rulings, it cannot avoid the substance of its prior allegations and arguments by exalting form instead. Despite having failed

[1] Opsys Limited files this opposition brief on its own behalf only. Opsys Limited is informed and believes that CDT will file its own, separate opposition.
[2] On October 23, 2002, two million British pounds equaled approximately $3.14 million.
[3] All emphasis herein is added, unless otherwise noted. Opsys Limited incorporates herein by reference its Statement of Record re: CDT, filed on March 20, 2007.

to plead a complaint against CDT, Plaintiff now offers flimsy arguments why this Court should ignore long-standing principles of corporate law to pierce the corporate veil and inscribe CDT's name on a judgment against Opsys Limited. Plaintiff proposes to initiate proceedings against CDT simply by handing CDT a judgment. The Court should not indulge such extraordinary relief.

Plaintiff's strategy on this motion is to offer the Court a buffet of choices in the hope of enticing the Court to nibble at something. Plaintiff mixes and matches different transactions that occurred over a three-year period between several parties, and argues that CDT is either a successor in interest to Opsys Limited on one of four successor liability theories, or an alter ego of Opsys Limited, or the recipient of a fraudulent transfer. No matter which theory it advances, however, Plaintiff urges that it is entitled to an immediate judgment against CDT, either pursuant to Federal Rule of Civil Procedure 25(c), or perhaps Rule 69(a). Plaintiff throws together a hodge-podge of cases to support its stream of consciousness argument. But the law and facts, when untangled and analyzed in a thoughtful manner, cannot justify the inequity of slapping a judgment on non-party CDT nor support Plaintiff's overreaching characterizations.

The starting point, of course, is the fact that none of the successor liability, alter ego, or fraudulent transfer issues raised by Plaintiff have ever been tried or adjudicated. CDT has never had an opportunity to defend against the charges. Opsys Limited believes these issues were dismissed on the pleadings after two rounds of dispositive motions. *See* Docket Nos. 20, 39 and 175. Plaintiff, however, contends that it should benefit from its own prior labeling error and get a second bite at the apple. It should not be rewarded by its own mislabeling mistake, and the Court's previous orders should dispose of this motion.[4] Nevertheless, the Court may also deny Plaintiff's motion on the merits.

Opsys Limited has an important interest in the outcome of this motion because it and its officers and directors made several representations and warranties that may be affected by the outcome of this motion. Schedule 3, "Warranties," of the Transaction Agreement, includes certain warranties and representation made by Opsys Limited as part of its transaction with CDT.

[4] Opsys Limited incorporates herein by reference its Statement of Record re: CDT, Docket No. 175.

In particular, in Section 24.4 of Schedule 3, the warrantors, (Mr. Michael Homes and Mr. Alexis Zervoglos), warranted that Opsys had no "contingent, conditional or other liability as original tenant, assignee, guarantor, surety or otherwise in respect of any real property or interest in real property." *See* Declaration of Robert H. Bunzel Re Motion to Add Cambridge Display Technology, Inc. as a Party to Action and Judgment, ("Bunzel Decl."), Exhibit ("Ex.") A, p. 64. Accordingly, Opsys Limited submits this response to Plaintiff's motion to add CDT as a party to this action and judgment because the legal rights of Opsys Limited and/or its warrantors under the Transaction Agreement could be affected by the outcome of this matter.

II. FACTUAL BACKGROUND

The core facts for this motion involve several corporate securities transactions between CDT, Opsys Limited and various other entities based primarily in the UK.[5]

A. Opsys Limited Splits Its UK and US Businesses

In the fall of 2002, Opsys Limited operated two business lines: (1) research into dendrimer materials, based in the UK, and (2) pilot manufacturing of displays based on small molecule emitters, a wholly different class of materials, based in Fremont, California. Opsys Limited signed a lease with Plaintiff to house its US operations on premises in Fremont.

Owing to the financial climate at the time, Opsys Limited was in serious financial trouble. According to its September 30, 2002, audited consolidated financial statements, Opsys Limited had under two million British pounds in total assets, but more than £17 million in liabilities. Opsys Limited therefore desperately needed some sort of financing transaction, but soon realized that potential investors were interested in only one or the other business line. Opsys Limited therefore decided to separate its businesses and seek funding for each line independently. Opsys Limited hired investment bankers to help it spin off and find investors for its US business.

By late 2002, CDT had emerged as a potential deal partner. However, CDT was not interested in Opsys Limited's US business and was unwilling to complete any transaction involving that business or its associated liabilities, including the lease. As part of the spin out

[5] Due to space limitations, only an abbreviated factual background is possible at this time.

process, Opsys Limited and Plaintiff entered into an Assignment and Consent of Lessor on October 18, 2002, which featured in the recent trial between the Plaintiff and Opsys Limited.

B. The 2002 Transaction

On October 23, 2002, Opsys Limited entered into a Transaction Agreement with several other parties, including CDT Acquisition Corp., which later changed its name to Cambridge Display Technology, Inc., the entity that Plaintiff is chasing with this motion.

As part of the 2002 transaction, Opsys Limited transferred the assets used in its UK business to a subsidiary called Opsys UK. Opsys Limited rec$2.5 million in cash in exchange for 16% ***of the shares*** of Opsys UK, which was later renamed CDT Oxford Limited. Under the agreement, CDT Ltd. took over management responsibility for ***the subsidiary***, CDT Oxford Limited, in exchange for 98% of any profits. Opsys Limited received a further $2 million for a license of its technology.

In addition, the Transaction Agreement gave CDT a call option to purchase the 84% of shares in Opsys UK/CDT Oxford Limited that were owned by Opsys Limited, and contained two put option provisions, one of which gave Opsys Limited's shareholders the right to sell to CDT (or, put more accurately, require CDT to purchase) all of the remaining ***shares*** in Opsys Limited if certain conditions were met. The put could not be exercised unless Opsys Limited's liabilities did not exceed $1.25 million and its share ownership in Opsys UK was its only material asset. *See* Exhibit Ex. E to the Declaration of Robert H. Bunzel re Motion to Add Cambridge Display Technology, Inc., as a Party to Action and Judgment ("Bunzel Decl.") at 81 of 99. Opsys Limited received another $500,000 for the call option.

The $5 million in cash that Opsys Limited received in the 2002 transaction and the value of the options greatly exceeded the value of the assets transferred to Opsys UK. *See* Bunzel Decl. at Ex. M.

In mid-2004, CDT announced its plan to go public and filed a Registration Statement with the Securities & Exchange Commission.

C. The 2004 Transaction

Subsequent to the parties' entry into the Transaction Agreement, certain disputes arose between Opsys and CDT about the transaction and, at one point, Opsys Limited contemplated taking legal action against CDT. Ultimately, the dispute was settled through a Settlement and Amended Agreement on August 3, 2004, which was amended in an Amended and Restated Settlement and Amendment Agreement, dated as of December 14, 2004.

As part of the settlement, CDT agreed to purchase 100% of the stock of Opsys Limited in exchange for 797,695 shares of stock of CDT. Under the original Transaction Agreement, CDT could not be obligated to acquire 100% of Opsys Limited unless Opsys Limited's liabilities were less than $1.25 million. In December 2004, Opsys Limited's liabilities were $1.6 million, excluding the Fremont lease, which both parties believed had been assigned more than two years earlier.

In the settlement, the parties recognized that, as with all acquisitions, Opsys Limited had potentially unknown liabilities. Because satisfaction of Opsys Limited's liabilities was a precondition to exercise of the put option, the Amendment Agreement included a provision whereby CDT would withhold in escrow 422,610 of the stock consideration otherwise payable to Opsys Limited shareholders. CDT set aside the portion of the consideration to ensure that (a) contingent liabilities would be satisfied ***by Opsys*** or its shareholders if the contingencies materialized, and (b) CDT did not assume Opsys Limited's liabilities.

On December 29, 2004, CDT went public.

D. Relevant Procedural History Of The Litigation

On December 14, 2004, Plaintiff, having learned that CDT was about to go public, filed a lawsuit against Opsys Limited and CDT (which it called "CDT Ltd.," although its factual allegations described the entity that acquired Opsys Limited). Plaintiff did not serve its lawsuit until January 2005, after CDT's initial public offering. The lawsuit alleged fraud and breach of contract against both Opsys Limited and CDT. The defendants removed the case to Federal court and moved to dismiss.

At oral argument on the defendants first motion to dismiss, the Court observed that CDT was not a party to the lease, and therefore should not be liable for its alleged breach. In response, Plaintiff argued that "CDT acquired Opsys, Limited, which was a party to the lease, ***so basically they are succeeding to it***." Docket Nos. 19, 37 at p. 2. On April 22, 2005, after the hearing, the Court dismissed the breach of contract claim against CDT on the ground that it was not a party to the lease, and dismissed the fraud claims against both defendants. Nevertheless, the Court gave Plaintiff leave to amend its complaint.

On May 11, 2005, Plaintiff filed a First Amended Complaint asserting that CDT was liable for breach of contract because it had assumed Opsys Limited's liabilities (Docket No. 21, at ¶ 15) and was Opsys Limited's alter ego. On August 8, 2005, the Court dismissed CDT from the case and all fraud claims ***with prejudice***. Docket No. 39.

Plaintiff then hired new lawyers, who immediately tried to add CDT back into the case with a motion under Federal Rule of Civil Procedure 25(c). At that time, Plaintiff stated that it needed to file an amended complaint explaining the purported factual basis for a successor liability claim against CDT. The Court denied the motion, declining to adjudicate either the Rule 25(c) or successor liability issues at that time, but permitted Plaintiff to file a Second Amended Complaint ("SAC") in order to bring "welcome clarity" to the allegations.. Docket No. 57.

In its SAC, Plaintiff alleged that the CDT transaction somehow constituted a breach of the implied covenant of good faith and fair dealing. Nevertheless, Plaintiff sought no discovery from CDT (though it devoted extensive discovery to learning about CDT, including retaining an expert to opine about the 2002 and 2004 transactions), and ultimately dropped all of its assertions touching on CDT ahead of trial. Following its decision, Plaintiff argued successfully that the Court should not permit any equitable defenses at trial, including *laches*, because the only claim to be tried was a narrow, legal one for breach of contract.

Opsys Limited also filed a motion *in limine* ahead of trial to exclude evidence about the corporate securities transactions between CDT and Opsys Limited. The Court substantially granted the motion. Neither CDT not any of its directors, officers or employees were called at trial; no CDT transaction documents were admitted into evidence; Plaintiff did not offer its expert

to opine about the CDT transaction. No factual issues relating to the Transaction Agreement or CDT were tried or adjudicated.

At the close of evidence, the Court granted Opsys Limited's oral Motion for Judgment as a Matter of Law with respect to Plaintiff's supposed implied covenant of good faith claim.

In addition, the Court granted Plaintiff's Motion for Judgment as a Matter of Law regarding Opsys Limited's equitable estoppel defense. During argument, counsel for Plaintiff expressly acknowledged that an equitable estoppel might eventually be available to CDT. The Court granted Plaintiff's motion.

The jury instructions and verdict form never mention CDT. On March 9, 2007, the jury reached a verdict that found that Opsys Limited breached the lease and owed $4.8m in damages.[6]

In a post-trial status conference statement, Plaintiff advised the Court that it intended to try to hail CDT back into the case on a successor liability theory. In that statement, Plaintiff stated that it needed to conduct as much as six months more of discovery. Docket No. 171 at p. 2. Nevertheless, on April 2, 2007, Plaintiff filed a second Rule 25(c) motion, in which it reversed its prior positions that a new complaint and discovery are appropriate, and that CDT may have equitable defense, and instead urged that that CDT simply be tacked on to any judgment against Opsys Limited immediately.

III. ANALYSIS

Plaintiff relies chiefly on Federal Rules of Civil Procedure 25(c) and 69(a) as a basis to use its successor liability and alter ego theories to bootstrap CDT into the case now. Neither Rule is helpful for a number of reasons, not the least of which is Plaintiff's inability to articulate facts sufficient to prove its theories.

A. Rule 25(c) Does Not Apply Here

In its opposition to Plaintiff's previous Rule 25(c) motion, Opsys Limited explained why, under applicable legal authorities, that Rule does not apply in the circumstances present here. *See* Docket No. 52.

[6] Opsys Limited has pointed out elsewhere that the jury's verdict is irreconcilably inconsistent and must be vacated. Nothing herein should be construed to imply disagreement with or a waiver of that position.

The Ninth Circuit has held that Rule 25(c) is a purely procedural rule that does not provide for survival of right of action (which depends on substantive law). *See Hilbrands v. Far East Trading Co., Inc.*, 509 F.2d 1321, 1323 (9th Cir. 1975). As previously noted, Rule 25(c) allows an action to be continued by or against the original party after a transfer of interest *with respect to the subject matter of the suit*. *See* 6 James W.H. Moore, et al., Moore's Federal Practice 25 at §25.30 (3d ed. 2005). Courts interpret Rule 25(c) to mean transfers of various kinds of property interests that may be involved in a lawsuit, for example a transfer of property or rights by assignment. *See Moore's* at §25.31; *In re Bernal*, 207 F.3d 595, 598 (9th Cir. 2000). *See also Maysonet-Robles v. Cabrero*, 323 F.3d 43, 49 (1st Cir. 2003) (transferee brought into court solely because it has come to own property in issue).

Many of the cases cited by Plaintiff affirm this point. In *Koehler v. Bank of Bermuda Ltd.*, No. M18-302, 2002 WL 1766444 (S.D.N.Y. Jul. 31, 2002), the court expressly stated that a successor in interest "may be a person or entity who acquires *the particular interest at stake in the litigation*, such as a certain piece of property or a contractual right, or who acquires all the assets and liabilities of a party to the litigation." *Id.* at *3. The Court later reiterated that Rule 25(c) generally requires a litigant to transfer "*its particular interest in the litigation* or [] all of its assets and liabilities." *Id.* at *4. Similarly, in *Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69 (3d Cir. 1993), the Court reversed an order granting a Rule 25(c) motion, and noted that "[a] 'transfer of interest' in the corporate context occurs when one corporation becomes the successor to another by merger *or other acquisition of the interest the original corporate party had in the lawsuit*." *Id.* at 71. Rule 25(c) "is designed to allow the action to continue unabated *when an interest in the lawsuit* changes hands." *U.S.I. Prop. Corp. v. M.D. Const. Co., Inc.*, 186 F.R.D. 255 (D. P.R. 1999), *vacated on other grounds*, 230 F.3d 489 (1st P.R. 2000) (quoting a Fifth Circuit case). CDT undeniably did not receive a transfer of the subject matter of this litigation, namely, the lease. The rule does not apply here.

While cases acknowledge that an interest can be transferred individually (*e.g.*, by sale of the particular item at issue in the lawsuit), or as part of a merger (which automatically transfers the transferee's interests in the lawsuit), CDT did not merge with Opsys Limited; both companies

exist as separate entities. CDT Inc. did not receive property from Opsys Limited in the 2002 transaction, and in 2004 it simply purchased stock from Opsys Limited, which it received pre-litigation and which is not and never has been the subject matter of this lawsuit.

As before, Plaintiff steers clear of *Equal Employment Opportunity Comm'n v. Pan American World Airways, Inc.*, No. C-81-3636 RFP, 1987 U.S. Dist. LEXIS 15182 (N.D. Cal. Dec. 1, 1987). In *Pan American*, Chief Judge Peckham held that Rule 25(c), by its own terms, does not apply to stock transfers between shareholders and parent corporations. The plaintiff in *Pan American* sued Pan Am Airways. During the case, Pan Am reorganized to become a subsidiary of a holding company (Holding), whose shares were exchanged with Pan Am shareholders' shares. The plaintiff offered three arguments to join Holding under Rule 25(c): (1) Holding had acknowledged its potential liability in a Shareholders Report, (2) Holding and Pan Am had the same directors, and (3) Pan Am was thinly capitalized to help limit Holding's liability. The Court rejected these arguments and denied the Rule 25(c) motion.

Unlike in *Pan American*, Opsys Limited and CDT do not have the same directors. Moreover, as in *Pan American*, Opsys Limited reorganized to become a holding company of Opsys UK, and then later became a subsidiary of CDT. Importantly, Opsys Limited did not transfer any assets to CDT Inc. in 2002. Rather, Opsys UK, received some (but not all) of Opsys Limited's assets, and in return Opsys Limited received $5 million in valuable consideration, not to mention the stock option. Thus, the facts are even more compelling that Rule 25(c) does not apply than those in *Pan American*.

B. Plaintiff's Arguments on Successor Liability, Alter Ego Liability, and Fraudulent Transfer Fail on the Facts and on the Law

Faced with significant Rule 25 problems, Plaintiff tries to justify its effort to hold CDT responsible without the bother of a complaint, discovery or trial by invoking three arguments which it believes would, if proven, support liability against CDT. Distilling Plaintiff's brief, it is apparent that Plaintiff relies heavily, and perhaps exclusively, on successor liability, alter ego liability and fraudulent transfer. Taking on three such fact-intensive and circumstance-driven theories in one post-trial motion is no easy task, and Plaintiff falls short on all three efforts.

First, each such theory is driven by facts that must be proved at trial and not by hyperbolic assertions of counsel. Second, each theory plaintiff tries to invoke has requirements set out by statute or case law that Plaintiff cannot come close to fulfilling. Third, the effort to justify a Rule 25 substitution by reason of these arguments further showcases the weaknesses of the basic motion.

1. Plaintiff's Successor Liability Arguments Fail

Plaintiff first attempts to justify the Rule 25 joinder by establishing successor liability with neither a complaint nor a trial. The gist of the claim, though, is that since CDT bought all of Opsys Limited's stock, it is a successor responsible for the liability on the lease. Because it cannot be disputed that Opsys Limited did *not* transfer the least to CDT, Plaintiff argues that CDT is responsible for Opsys Limited's lease liability on one of four successor liability theories. As a footnote to this discussion, since Rule 25(c) is purely procedural, the failure of these successor liability theories as a substantive matter dooms Plaintiff's attempt to add CDT under this rule. *See Hilbrands*, 509 F.2d at 1323.

Case law recognizes four ways in which successor liability can be imposed against a party other than the actual debtor. As typically formulated, the rule states that the purchaser does not assume the seller's liabilities unless (1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts. *Ray v. Alad*, 19 Cal. 3d 22, 28 (Cal. 1977).[7] Plaintiff fails under each element.

The law is well-settled ***against*** the imposition of successor liability. The general rule of successor non-liability holds that where one company sells or transfers all of its ***assets*** to another, the purchaser is not liable for the debts and liabilities of the seller. *See Marks v. Minnesota Mining and Manufacturing Co.*, 187 Cal. App. 3d 1429, 1435 (1986). The rule promotes the predictability vital to the corporate field, keeps transaction costs reasonable, and preserves the

[7] Plaintiff fails to address the choice of law issue regarding successor liability. In this brief we discuss the California law on which Plaintiff relies. However, Opsys Ltd. Does not concede that California law, rather than Delaware law, UK law, or some other law, should apply.

climate of relative certainty necessary to make major economic decisions. The imposition of successor liability long after the transfer of assets defeats the legitimate expectations of the parties held during negotiation and sale. *See Franklin v. USX Corp.*, 87 Cal. App. 4th 615, 625 (2001); *Monarch Bay II v. Prof'l Serv. Indus., Inc.*, 75 Cal. App. 4th 1213, 1218 (1999).

The law recognizes the limited exceptions to the general rule discussed above and embodied in the successor liability theories. Ordinarily, successor liability comes into play only when a company ***sells its assets*** for ***inadequate consideration*** and then ***liquidates***. *See Ray v. Alad*, 19 Cal. 3d 22, 28 (1977). Under California law, "[e]liminating the exceptions requires disproving *at least one element* of each exception or showing that *at least one such element cannot be established*." *Fisher v. Allis-Chalmers Corp.*, 95 Cal. App. 4th 1182, 1188 (2002) (emphasis added). Here, over and above the due process problems with Plaintiff's proposed cause of action, CDT can disprove at least one element of each exception.[8]

a. CDT Did Not Assume The Lease In Any Transaction

Plaintiff argues that CDT somehow assumed the lease liability pursuant to the Transaction Agreement. The argument relies chiefly on distortions of the terms of the relevant agreements and does not withstand scrutiny.

In assessing an assumption successor liability claim, the Court looks to the Transaction Agreement itself. *See Martin v. Watson/Hopper, Inc.*, No. F041808, 2004 WL 42596 (Cal. App., Jan. 8, 2004); *Zimmerman v. Accredited Home Lenders, Inc.*, No. 3158616, 2003 WL 21744323 (Cal. App., Jul. 29, 2003)(court looks at contract terms); *Fisher*, 95 Cal. App. 4th 1182 (same).

[8] As a preliminary matter, Plaintiff's is wrong that successor liability may be imposed on CDT without a trial. In *Luxliner, supra*, the Third Circuit reversed a Rule 25(c) order joining a putative successor to a judgment on *de facto* merger and mere continuation successor liability theories. The Court held that due process concerns are particularly acute where a Rule 25(c) motion effectively seeks to impose liability, and they require at least an evidentiary hearing after an adequate opportunity to be heard. Moreover, in *Panther Pumps & Equip Co., Inc. v. Hydrocraft Inc.*, 566 F.2d 8, 24 (7th Cir. 1977), the Court found that successor liability could be imposed consistently with due process only because the putative successor was afforded a two week evidentiary hearing to defend itself substantively against a successor liability charge, confront and cross-examine witnesses, and present evidence in its favor, etc. The successor liability and other issues raised in Plaintiff's motion were not adjudicated at trial. Plaintiff insisted at trial that all equitable defenses be struck, and was largely successful in achieving that goal. But successor liability and alter ego are equitable theories, and equitable defenses are available. Plaintiff moved successfully for Judgment as a Matter of Law on Opsys Limited's equitable estoppel defense, but acknowledged at that time that CDT might have an equitable estoppel defense. Under the circumstances, CDT has not had its day in court and cannot be added to the judgment.

Under California's statute of frauds, an agreement for real property lease for a period of more than one year is invalid unless in writing and subscribed by the party to be charged, and an interest in real estate cannot be transferred absent a writing. *See* Cal. Civ. Code §§ 1091, 1624(a)(3); Cal. Code Civ. P. § 1971. The Transaction Agreement contains no written provision assuming the lease or liabilities. If anything, its terms show that CDT did not assume the lease, including section 24.4, in which Opsys Limited expressly disavows any lease obligation. *See* Bunzel Decl., Ex. A. That provision is inconsistent with an assumption of the lease liability.[9]

Plaintiff makes three arguments in support of assumption. First, it suggests that the "WHEREAS" clause "(E)" in the Transaction Agreement somehow transfers Opsys Limited's lease liability to CDT. It does not. That clause states that "***[i]t is the intention that***, after the date of this agreement . . . all liabilities or obligations of any kind ***relating to*** such operations [of Opsys's US subsidiaries] . . . are divested into a newly incorporated company." The evidence adduced at trial was uncontroverted that the Fremont lease "related to" the operations of Opsys's US subsidiary. Thus, far from assuming the lease liability, the Transaction Agreement expresses an intent ***not*** to assume that liability. Mr. Zervoglos's undisputed trial testimony corroborates that fact.

Plaintiff's suggestion that paragraph 7.5 of the Transaction Agreement somehow assumed Opsys Limited's lease liability also is misleading. Paragraph 7.5 states that "CDT and CDT UK shall be responsible for all liabilities arising from ***its*** management of ***Opsys UK*** . . . ." *See* Bunzel Decl. at Ex. A. As Plaintiff knows, Opsys UK is a different entity from Opsys Limited, and never was a party to the lease or this litigation. Plaintiff's deceptively loose language highlights why any successor liability claim is best resolved in an orderly trial on the merits of properly pled factual allegations, and not rushed through in some shotgun motion.

Finally, Plaintiff suggests that a routine escrow against unknown liabilities somehow is an assumption of liabilities. Plaintiff's position is nonsensical. The purpose of the escrow plainly is

[9] Nor can Plaintiff show an implied assumption because that requires proof that the transferee voluntarily accepted all of the benefits of a contract before it is liable for the burdens of that contract. *See Zimmerman*, 2003 WL 21744323 (upholding defendant's demurrer because it had not accepted any of the benefits of the contract). at *5-6. CDT undeniably never accepted any benefit of the Fremont lease.

just the opposite: to assure that if any unknown liabilities did emerge, they would be satisfied by Opsys Limited from the escrowed portion of the consideration, and not by CDT. The escrow evidences an intent ***not*** to assume liabilities.

b. There Is No De Facto Merger Between CDT and Opsys Limited

Generally, the elements required for a de facto merger successor liability theory are: (1) whether the consideration paid ***for the assets*** was solely stock of the purchaser, (2) whether the purchaser continued the same enterprise after the sale, (3) did the seller's shareholders become shareholders of the purchaser, (4) did the seller liquidate, and (5) did the buyer assume the liabilities necessary to carry on the seller's business. *Marks*, 187 Cal. App. 3d at 1436 (emphasis added).

Here, despite Plaintiff's best efforts to conflate several transactions, Opsys Limited's UK assets were transferred to Opsys UK -- not CDT -- in the 2002 transaction. Opsys Limited received $5 million in cash in that transaction. As a matter of law, that ends the analysis. In *Gee v. Tenneco, Inc.*, 615 F.2d 857 (9th Cir. 1980), the Ninth Circuit, interpreting California law, affirmed a finding no de facto merger because the exception requires that the "sole consideration" in an asset sale must be stock before a transferee can be liable as a successor. In *Marks*, the critical fact in finding a de facto merger was the intrinsic structure and nature of a sale of assets for stock, which is akin to a merger and "*unlike a sale of assets for cash.*" 187 Cal. App. 3d at 1438. California courts uniformly refuse to hold a purchaser of assets liable under a de facto merger theory without a showing that the assets were purchased for stock. *See, e.g.*, *Ray*, 19 Cal. 3d 22 (consideration for assets was solely cash and no stock, court found no de facto merger); *Franklin*, 87 Cal. App. 4th 615 (same); *Ortiz v. South Bend Lathe*, 46 Cal. App. 3d 842 (1975) (same).

Nor could the 2004 transactions be a de facto merger because Opsys Limited did not sell or transfer any assets. Rather, CDT purchased capital stock of Opsys Limited from its shareholders. Thus, CDT simply became the 100% shareholder of Opsys Limited, which became a wholly, owned subsidiary, and remains insulated from liability under long-standing principles of shareholder non-liability.

A comparison of the facts of this case with those in the seminal California de facto merger case, *Marks v. Minnesota Mining and Manufacturing Co.*, starkly illustrates the type of showing required for a finding of de facto merger and the inapplicability of the exception here. In *Marks*, the purchaser (3M) bought *all* of the seller's (McGhan/Cal) assets and paid solely with 3M *stock*. *All* McGhan/Cal shareholders became 3M shareholders by virtue of the transaction, and *all* five McGhan/Cal founders continued to work for 3M in the same capacity after the reorganization, so that the "operating board" remained the same. 3M assumed all of McGhan/Cal's normal operating liabilities and manufactured and marketed the exact same product as McGhan/Cal, without alteration. Further, *all* McGhan/Cal employees were asked to sign employment agreements with 3M. None of these facts are present here; to the contrary, Opsys Limited received cash in return for an interest in Opsys UK, and, as established at trial, none of Messrs. Holmes, Zervoglos or Reddy (Opsys Limited's CEO, CFO and COO respectively) ever worked for CDT. Finally, the fact that CDT and Opsys Limited both were in the display business *before* the transactions does not establish successor liability. *See Luxliner*, 13 F.3d at 74 (merely engaging in the same business not conclusive of successor liability).

c. CDT Is Not A "Mere Continuation" Of Opsys Limited

The "mere continuation" successor liability exception envisions a reorganization transforming a *single company* from one corporate entity to another, such that the new company is merely a "reincarnation" of the transferor company. *See Maloney v. American Pharm. Co.*, 207 Cal. App. 3d 282, 287 (1988); *Koch v. Speedwell Motor Car Co.*, 24 Cal. App. 123 (1914). California cases consistently hold that there is no continuation or reincarnation of the seller where *two* corporate entities exist and operate by virtue of separate and distinct charters both *before* and after the sale and the asset sale was negotiated at arm's-length. *See, e.g., id.*; *Tidewater Oil Co. v. Workers' Comp. Appeals Bd.*, 67 Cal. App. 3d 950, 955-56 (1977); *Ortiz*, 46 Cal. App. 3d at 847. *See also Kline v. Johns-Manville*, 745 F.2d 1217, 1219 (9th Cir. 1984) (Generally, California does not impose successor liability on a corporation that purchases the assets of a selling corporation in an arm's-length transaction). Here, it is undisputed that CDT and Opsys Limited

have always been distinct corporate entities with separate corporate charters, and the transactions at issue were the product of arm's-length negotiations.

An "essential ingredient" of "overriding significance" to the mere continuation exception is that inadequate consideration is paid for the purchased assets; without a showing of inadequate consideration, a mere continuation claim is fatally deficient. *Franklin*, 87 Cal. App. 4th 627; *Maloney*, 207 Cal. App. 3d at 287 ("Before one corporation can be said to be a mere continuation or reincarnation of another it is ***required*** that there be insufficient consideration running from the new company to the old."); *Enos v. Picacho Gold Mining Co.*, 56 Cal. App. 2d 765, 778 (1943) (lack of consideration is "essential element" of mere continuation).

The Ninth Circuit confirmed and emphasized this view as to successor liability generally in *Katzir's Floor and Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143 (9th Cir. 2004). The Court held that the adequacy of consideration question involves a causation element. *See also Monarch Bay II,* 75 Cal. App. 4th 1213 (indicating that there must be a causal relationship between a successor's acquisition of assets (i.e., inadequate consideration), and the predecessor's creditors' inability to get paid).

Although Plaintiff grudgingly acknowledges this element, it fails to analyze it correctly. Causation is established by doing a direct comparison of the value of the individual assets purchased (which would have otherwise been available to provide a remedy to the creditors) versus the actual dollars paid for those assets. As Plaintiff's own exhibits show, Opsys Limited's consolidated assets (i.e., of both its US and its UK businesses) were worth less than two million British pounds; it received $5 million in the 2002 transaction. It is undisputed then, that CDT paid more for Opsys Ltd assets than the value of those assets on the books of Opsys Limited. Undeterred, Plaintiff suggests that the amount paid by CDT was less than the liabilities of Opsys Limited. This is a false and illogical comparison unsupported by any law. The logical conclusion of this argument is that a company with some assets but heavy liabilities could never sell its assets at fair market value without running into a successor liability roadblock. Neither the law nor reason supports such a radical result. Plaintiff's attempt to compare the $5 million paid for Opsys Limited's assets against Opsys Limited's liabilities is contrary to law, erroneous and

irrelevant, and simply reinforces the fact that Opsys Limited's assets were worth less than its liabilities. That reality has nothing to do with successor liability.

Inadequate consideration is necessary, but not sufficient, to prove successor liability. California law also requires more substantial continuity of management than the overlap of just one individual. In *Franklin*, 87 Cal. App. 4th at 626-27, the court refused to find successor liability, even though the same individual was the president and a board member of both the seller and purchaser corporations. After reviewing all of the cases cited by the California Supreme Court in *Ray*, 19 Cal. 3d at 29, the *Franklin* court noted that, with respect to common directors, officers, or stockholders, the cases finding successor liability involved "near complete identity of ownership, management or directorship after the transfer." *Id.* at 627. Furthermore, the court noted that "[n]one of these cases involved a situation . . . where . . . only a single person with minimal ownership interest in either entity remained as an officer and director." *Id.*

In *Maloney*, 207 Cal. App. 3d at 287, the Court was even more explicit, stating that mere continuation involves continuity beyond the single officer that the two corporations shared there. Even though one or more persons were officers, directors, or stockholders of both corporations involved and the purchaser held itself out to the public as a continuation of the seller, the court found no mere continuation. Plaintiff here offers no continuity of officers. It offers only that Opsys Limited's former CEO was allowed to attend CDT board meetings as an observer (but was never a board member himself) and that a former Opsys Limited officer became a board member of Opsys UK (but not CDT). That does not suffice.

d. Plaintiff Cannot Establish That Any Transaction Was For A Fraudulent Purpose

As Plaintiff appears to acknowledge, the fraudulent purpose exception to successor non-liability is merely an application of the law of fraudulent transfer. Motion at 21-22 (citing the California's Uniform Fraudulent Transfer Act ("UFTA") in support of its successor liability argument). *See also* William B. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 7125 (updated Sept. 2004). Once again, however, Plaintiff's analysis is irreparably flawed. The law of fraudulent transfer, which is wrapped into the successor liability

exception, has requirements established by statute. *See* California Civil Code sections 3439.01, 3439.03, 3439.04, 3439.05, and 3439.08. Central to any fraudulent conveyance claims is the requirement that Plaintiffs prove that the seller transferred assets and received less that reasonably equivalent value in exchange. Throughout this case, Plaintiff has argued that CDT bought Opsys Limited's assets for some $26 million, making a claim of inadequate consideration somewhat improbable.

Nevertheless, Plaintiff offers two arguments in support of its fraudulent transfer theory. First, Plaintiff quotes a public statement by CDT that it wanted to "gain control of an economic interest in the UK assets and operations of Opsys [Limited]" . . . in such a manner to avoid acquiring any interest in any other assets or liabilities of Opsys [Limited]." Motion at 21. This, according to Plaintiff, amounts to a fraud. Plaintiff is wrong. A transaction that allows a party to acquire assets without accepting the seller's liabilities is lawful and does not give rise to successor liability, provided the consideration for the assets received was adequate. *See Abbott v. Eviciti Corp.*, No. IP 01-1802-C H/K, 2005 WL 1799438 at *4 (S.D Ind. Jun 29, 2005).

Second, Plaintiff argues that the cash "provided by [CDT] in 2002 was inadequate to pay Opsys Limited's then-stated debts in excess of £17 million British pounds[.]" Motion at 21. Plaintiff again has the law wrong. CDT had no obligation to provide consideration sufficient to pay Opsys Limited's debts. Rather, the proper test for fraudulent transfer purposes is whether the value received by Opsys Limited was reasonably equivalent to the value of the transferred assets. *See* Cal. Civ. Code §§ 3439.05 (transfer not fraudulent if reasonably equivalent value received) and 3439.08(a) ("a transfer is not voidable . . . against a person who took in good faith and for a reasonably equivalent value . . . ."). *See also Annod Corp. v. Hamilton & Samuels*, 100 Cal. App. 4th 1286, 1294-95 (2002); *Atkinson v. Western Dev. Syndicate*, 170 Cal. 503, 509 (1915) (transfer is not fraudulent if adequate consideration is paid for assets). As explained above, Opsys Limited received $5 million in cash, while the value of its assets was just under £2 million. Thus, Opsys

Limited received more than reasonably equivalent value for its assets, and there can be no fraudulent transfer.[10]

Finally, any fraudulent transfer claim by Plaintiff against CDT would be barred by the applicable statute of limitations. *See* Cal. Civ. Code 3439.09.

e. Plaintiff's Attempt to Argue Successor Liability Fails On the Law and the Facts

The elements of successor liability set out above are insurmountable obstacles to Plaintiffs' current attempt to loop in CDT by motion. Perhaps more obvious from the discussion is the fact-intensive nature of each exception and element in this area of law. Plaintiff's ineffective attempt to prove the plethora of facts necessary by its submission of attorney and expert declarations (that in large measure attempt to mischaracterize public filings) is a demonstration of the futility and unfairness of the effort. Plaintiff's attempt to substitute declarations for a trial against a non-party must fail.

2. Plaintiff Cannot Prove Alter Ego Under State Law For Rule 69(a) Purposes

Plaintiff next attempt to justify its Rule 25(c) motion by suggesting (after its first attempt to do so was dismissed with prejudice) that CDT is the alter ego of Opsys Limited. Plaintiff argues that Rule 69(a) allows a judgment creditor to employ the practice and procedures of the forum state in proceedings in aid of a judgment or execution of a judgment. Plaintiff therefore relies on California Code of Civil Procedure § 187 (a catch-all jurisdictional section) to claim that it can simply add CDT to the judgment.

The applicable California cases make clear that, in order to make this argument, Plaintiff must prove that CDT both (1) is the alter ego of Opsys Limited, ***and*** (2) controlled the litigation. *See Triplett v. Farmers Ins. Exchange*, 24 Cal. App. 4th 1415, 1421 (1994). But this Court dismissed Plaintiff's attempts to plead alter ego ***with prejudice*** almost two years ago, in August

[10] These facts dispose of Plaintiff's alternate theory that it may add CDT to any judgment pursuant to Federal Rule of Civil Procedure 18(b).

2005. Having tried and failed to make this claim at the outset of this action, Plaintiff cannot revive it with backdoor maneuvers.[11]

Even if the Court indulged Plaintiff's alter ego allegation (and it should not), this motion still must be denied. The law allows corporations to organize for the purpose of isolating liability of related corporate entities, and only in unusual circumstances will the law permit a parent corporation to be held either directly or indirectly liable for the acts of its subsidiary. *See Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, (N.D. Cal. 2004). Thus, the law presumes that Opsys Limited and CDT have separate corporate existence, and the burden of overcoming that presumption rests upon Plaintiff. *See Mid-Century Ins. Co. v. Gardner*, 9 Cal. App. 4th 1205, 1213 (1992). Alter ego liability may be applied only in narrowly defined circumstances. *See Mesler v. Bragg Mgmt. Co.*, 39 Cal. 3d 290, 300 (1985). To prevail on an alter ego claim, Plaintiff must show (1) there is such a unity of interest that the separate personalities of the corporations no longer exist, and (2) inequitable results will follow if the corporate separateness is respected. *See Tomaselli v. Transamerica Ins. Co.*, 25 Cal. App. 4th 1269, 1285 (1994).

Plaintiff can establish nothing more than that Opsys Limited now is a wholly-owned subsidiary of CDT (but was not in 2002). The United States Supreme Court has noted that "[i]t is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 62, 68 (1998). Further, "it is hornbook law that the exercise of 'control' which stock ownership gives to the stockholders . . . will not create liability beyond the assets of the subsidiary." *Id.* A parent corporation is not liable on the contract of its subsidiary simply because it is a wholly owned subsidiary. Some other basis must be established. *See Northern Natural Gas Co. v. Superior Court*, 64 Cal. App. 3d 983 (1976).

Under California law, routine control of a subsidiary by a parent is insufficient to support the contention that a subsidiary is a mere instrumentality for purposes of alter ego. *See Nordberg*

[11] Plaintiff also argues that section 187 applies to successor liability theories, citing *McClellan v. Northridge Park Townhome Owners Ass'n, Inc.*, 89 Cal. App. 4th 746 (2001). In *McClellan*, however, the Court essentially found alter ego, resting its decision primarily on the fact that the old company never wound up, but simply reorganized and changed its name. Regardless, since Plaintiff's successor liability claims fail as a substantive matter, Rule 69(a)'s procedural purpose is irrelevant.

v. Trilegiant Corp., 445 F. Supp. 2d 1082 (N.D. Cal. 2006). Plaintiff does not even come close to meeting these requirements, nor can it. In *Tomaselli, supra*, the court held that facts showing that a parent company owns 100 percent of the subsidiary's stock, that the two companies shared office space and policy manuals, have some common personnel and consolidated financial statements fall "woefully short" of establishing alter ego. In *Bowoto, supra*, the Court relied on several authorities to explain that:

> Officers of a parent corporation may be involved in the supervision of a subsidiary corporation without incurring liability for the parent corporation. Typical acts of parent corporation officers which are within the bounds of corporate formalities and do not warrant veil-piercing include: supervising the acts of the subsidiaries; receiving regular reports from the subsidiaries; creating general policies and procedures which the subsidiaries must follow; and overseeing the financial management of the subsidiaries. Appropriate parental involvement includes: monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget and articulation of general policies and procedures. Officers of a parent may also simultaneously act as officers of the subsidiary without having their duties as parent corporation officers' presumed to be effectuated also on behalf of the subsidiary corporation. Liability will not be imposed on a parent merely because directors of the parent corporation also serve as directors of the subsidiary.

Bowoto, 312 F. Supp. 2d at 1235 (citations and quotations omitted). In light of the law, Plaintiff's efforts too fall woefully short.

Nor can Plaintiff prove the second alter ego prong. Alter ego liability will be upheld only when there is ***clear*** bad faith, fraud, flagrant abuses, and manifest injustice. *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 535 (2000). *See also Nordberg*, 445 F. Supp. 2d 1082 (for a court to pierce the corporate veil, it must determine that there is bad faith conduct by the parent corporation that would otherwise remain without remedy). Notwithstanding Plaintiff's conclusory accusations, there is no evidence of clear bad faith, fraud, flagrant abuses or manifest prejudice.[12] The transactions at issue show nothing more than two corporations entering into a

[12] "The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form." *Sonora*, 83 Cal. App. 4th at 539. The "injustice" or "inequity" on which an alter ego claim is based cannot stem from the mere existence of limited liability, which is a legitimate characteristic of the corporate form. Rather, the injustice or inequity must be connected with the lack of separateness between the corporation and its controlling

lawfully permitted transaction, supported by reasonably equivalent value, after arm's-length bargaining.

California courts have rejected the view that the potential difficulty a plaintiff faces collecting a judgment is an inequitable result that warrants application of the alter ego doctrine. *See Tamko Roofing Products, Inc. v. Smith Engineering Co.*, 450 F.3d 822, 828 (8th Cir. 2006), citing *Neilson v. Union Bank of California, N.A.*, 290 F. Supp. 2d 1101, 1117 (C.D. Cal. 2003); *Sonora*, 83 Cal. App. 4th at 539 ("Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard."). In sum, that is the gravamen of Plaintiff's argument -- that because it likely cannot collect from Opsys Limited, it should be allowed to collect from CDT.

If anything, it would be inequitable to allow Plaintiff to collect rent owed on its lease from CDT. First, as this Court has recognized, CDT was never a party to the lease, and was not in any way connected to Opsys Limited when it entered into the lease, let alone its alter ego. Docket No. 39 at p. 2. Second, the evidence of record is undisputed that, had CDT known that about the lease liability, it would not have done *any* transaction with Opsys Limited, either in 2002 or 2004. Docket No. 74 at p. 2. Furthermore, CDT could not have been required to purchase the outstanding stock of Opsys Limited in 2004 if Opsys Limited had liabilities in excess of $1.25 million. Plaintiff should not be rewarded for sitting on its hands for more than two years while CDT went about its business, and CDT should not be prejudiced by Plaintiff's choice.

In addition, both Opsys Limited's September 30, 2002, financial statements and the uncontradicted evidence adduced from every witness at trial established that Opsys Limited was unable to pay its rent beyond October 2002 absent the CDT deal. That is precisely why Opsys Limited separated its UK and US activities, entered into a deal with CDT, hired Kaufman Brothers to assist with the spin off and $40 million private placement for Opsys US and, most importantly, bargained for and entered into the Assignment with Plaintiff. There is nothing inequitable in putting Plaintiff in exactly the position it would have been had there never been an

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stockholder and the failure to observe corporate formalities. *See Cascade Energy and Metals Corp. v. Banks*, 896 F.2d 1557, 1578 (10th Cir. 1990) (applying Utah law, which is the same as California law).

Assignment or CDT transaction. Plaintiff fails on both the facts and the law regarding alter ego. This attempt to prevent giving CDT its day in court must also fail.

IV. CONCLUSION

Plaintiff's attempt to adjudicate liability without the bother of a complaint, discovery or trial would be almost humorous were not the current motion actually before the Court for determination. Opsys Limited has clear interests that need to be heard on this subject, as does CDT. All of the arguments made, be they based on successor liability, fraudulent transfer or alter ego, are intensely factual and the effort to have facts decided without a contested trial is, to say the least, overreaching. Moreover, the current thrust by Plaintiff is contrary to the positions it has taken throughout the case. Originally, Plaintiff named CDT as a defendant, recognizing that a party to be charged had to be heard. Then, in the post-trial statement filed just a few weeks ago, Plaintiff sought to file an amended complaint, obtain discovery and proceed to a second trial. Now, Plaintiff seeks to eliminate all such steps. Both CDT and Opsys Limited should be advised of the facts alleged against them, be able to test those allegations and to defend themselves at trial.

Equally as important, the legal theories on which Plaintiff seeks to base the relief requested contain elements Plaintiffs does not and cannot satisfy. Plaintiff's motion fails on the facts, on the law and on the grounds of fairness. We have already proceeded to trial on the current Complaint and it only makes sense for Plaintiff to set forth its current claims in a new complaint and to proceed to trial on that complaint.

For the foregoing reasons, the Court should deny Plaintiff's motion to add CDT as a party to this action and judgment.

Respectfully submitted:

Dated: April 23, 2007

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